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# **National Security Without Secret Laws: How Other Nations Balance National Security Interests and Transparency of the Law**

**By Sudha Setty**

**July 2009**

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# National Security Without Secret Laws: How Other Nations Balance National Security Interests and Transparency of the Law

By Sudha Setty\*

One of the hallmarks of a democratic nation is that there are no secret laws.<sup>1</sup> Yet parts of the George W. Bush administration's legal policy that governed aspects of the war on terror were laid out in non-public opinions issued the Department of Justice's Office of Legal Counsel (OLC). Many of those opinions, which are almost always binding on the executive branch and are used to provide legal comfort to government officials in the form of protection against future investigation or prosecution, are still secret or were kept secret for years before being leaked or disseminated to Congress and the public.

Numerous scholars and politicians called for the disclosure of these OLC opinions,<sup>2</sup> and others similarly argued that secrecy in the development and implementation of legal policy runs afoul of the rule of law, compromises the quality of the OLC's legal opinions, and undermines confidence in the integrity of executive branch constitutional interpretation. The Bush administration claimed that greater disclosure would have jeopardized U.S. national security interests—a claim that is undermined by the experiences of other nations that have been able to both deal with national security concerns and maintain a greater level of transparency. This Issue Brief buttresses the calls for timely and structured disclosure of OLC opinions (on which the administration actually relies upon in executing its legal policy) by considering how other nations that face severe national security threats maintain greater transparency and public accessibility for legal policy related to national security matters.

Part I of this Issue Brief provides a short overview of the problems inherent in the politicization of OLC. Part II describes some of the Bush administration justifications for non-disclosure of OLC memoranda and addresses the concerns underlying the justifications. Part III uses the comparative examples of India, Israel, and the United Kingdom to illustrate how other nations facing serious national security challenges have opted for a significantly more transparent model of developing and implementing legal policy related to national security issues. Part IV examines whether the case for OLC reform can still be made given the Obama administration's disclosure of numerous Bush-era OLC opinions. This Issue Brief concludes by urging serious consideration of structural reform to ensure objectivity, transparency, and political accountability at OLC from administration to administration.

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<sup>1</sup> LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969).

<sup>2</sup> See, e.g., Walter Dellinger, Dawn Johnsen, et al., *Principles to Guide the Office of Legal Counsel* (2004), reprinted in 54 U.C.L.A. L. REV. 1559, app. 2.

## I. The Politicization of the Office of Legal Counsel

One of the fundamental responsibilities of the U.S. Attorney General and his or her subordinates in the OLC is to provide legal advice and counsel to the administration.<sup>3</sup> As the chief legal officer of the United States, the Attorney General has an obligation to uphold the rule of law by providing the best possible legal counsel to the President and administration and to limit the effect of political pressures to mold his or her opinion to facilitate the political goals of the President.<sup>4</sup> The importance of adhering to the rule of law is compounded when the legal opinions offered by the Attorney General are used as legal comfort: protecting government actors from future liability and criminal prosecution while conducting work on behalf of the administration.<sup>5</sup>

However, numerous obstacles exist to the OLC offering its most impartial, and arguably best, assessment of the law, including the inherent conflicts of interest which arise when the administration attempts to influence the OLC to issue opinions that are politically advantageous to the administration. Historically, this political pressure has been brought to bear during times of war or armed conflict, raising doubts as to whether any administration can achieve the “best practice” of offering non-politicized legal advice at all times.<sup>6</sup>

During the seven years of the Bush administration after the September 11, 2001 terrorist attacks, the OLC became highly politicized and drafted numerous memoranda and legal opinions which engendered criticism on two fronts: first, the substance of the policies promulgated,<sup>7</sup> and second, the process by which the OLC developed and implemented its legal policy.<sup>8</sup> Key memoranda which strongly influenced the administration’s prosecution of the war on terror included an extraordinarily narrow definition of “torture” as applied to detainees<sup>9</sup> and the provision of legal comfort to those interrogators who violated federal and international law.<sup>10</sup>

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<sup>3</sup> NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL’S OFFICE, 1789-1990* 1-2 (Univ. Press of Kansas 1992). See Dawn Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 U.C.L.A. L. REV. 1559, 1577 (2007) (noting that the opinions generated by the Office of Legal Counsel (OLC) are generally considered binding on the executive branch, unless the President or Attorney General disagrees based on a differing legal interpretation).

<sup>4</sup> Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT’L SECURITY L. & POL’Y 455, 464-66 (2005) (citing MODEL RULES OF PROF’L CONDUCT R. 2.1 (2003)) (arguing that the appropriate ethical standard for legal advice rendered by OLC lawyers is such that “the lawyer’s role is not simply to spin out creative legal arguments. It is to offer her assessment of the law as objectively as possible.”).

<sup>5</sup> JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 23, 96 (W.W. Norton & Co. 2007) (noting that it is “practically impossible to prosecute someone who relied in good faith on an [OLC] opinion, even if the opinion turns out to be wrong”).

<sup>6</sup> See, e.g., Dellinger, *supra* note 2, at 1603 (calling for the OLC to maintain a non-politicized stance in developing legal policy).

<sup>7</sup> See e.g., Editorial, *The Torturers’ Manifesto*, N.Y. TIMES, Apr. 18, 2009, at WK9 (criticizing recently disclosed OLC memoranda in which legal comfort was offered to interrogators using techniques on detainees such as waterboarding, sleep deprivation, slamming into a wall and locking in a box with insects).

<sup>8</sup> See generally Johnsen, *supra* note 3; Goldsmith, *supra* note 5; Trevor Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1250-58 (2006) (noting the executive branch’s use of constitutional avoidance theory to assert its right to circumvent the parameters of FISA); H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313 (2006).

<sup>9</sup> Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A, (Aug. 1, 2002) [hereinafter Bybee

Not only did these memoranda stake new legal ground for the administration, but their effect was compounded by unprecedented secrecy within the Department of Justice and administration as a whole, and to other branches of government and the public.<sup>11</sup> The nondisclosure of legal opinions and the opacity of the OLC created an environment in which other changes could be effected without outside oversight, including political influence on content and conclusions of the legal opinions drafted by the OLC.<sup>12</sup> The lack of information disclosure led to the breakdown of other norms, such as appropriate supervision within the OLC<sup>13</sup> and the use of external checks, including consultation with the general counsels for relevant administrative departments, in developing legal policy.

## II. Bush Administration Justifications for Nondisclosure

National security interests demand a heightened awareness of how sensitive information is treated, since the President has legitimate needs to act quickly and discreetly in times of war. Equally legitimate, however, is the need for the public and Congress to understand the country's legal policy vis-à-vis national security matters. The Bush administration justified its nondisclosure of legal policy by insisting, among other arguments, that nondisclosure of legal policy is necessary to maintain the integrity of U.S. national security interests.<sup>14</sup> The Bush administration often offered the defense that additional information about the content of OLC opinions would empower terrorists planning to attack the U.S.<sup>15</sup> Former Attorney General Alberto Gonzales testified that "widespread briefings would pose an unacceptable risk to the national security."<sup>16</sup>

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Memorandum]. The Bybee Memorandum was superseded, in part, by another memorandum, drafted by the acting head of OLC Daniel Levin, that addressed the applicability of the Convention Against Torture and disavowed some of the conclusions made in the Bybee Memorandum. See Memorandum to James B. Comey, Deputy Attorney Gen., Legal Standards Applicable Under U.S.C. §§ 2340-2340A (Dec. 30, 2004) [hereinafter Levin Memorandum].

<sup>10</sup> Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., to William J. Haynes II, Gen. Counsel, Dep't of Def., Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003) [hereinafter Yoo Memorandum].

<sup>11</sup> See *Oversight of the Department of Justice: Hearing Before the S. Judiciary Comm.*, 110th Cong. 3(2008) [hereinafter Oversight Hearing](statement of Sen. Patrick Leahy, Chairman, S. Judiciary Comm.) (noting the practices of the Justice Department leading it to be a "department of cloaking misguided policies under veiled secrecy, leaving Congress, the courts, but especially the American people in the dark.").

<sup>12</sup> Oversight Hearing, *supra* note 11, at 72 (statement of Sen. Patrick Leahy, Chairman, S. Judiciary Comm.) ("I'm worried we're not getting enough clarity on critical issues. We have heard reference to legal opinions, to justifications, facts that remain hidden from the Congress, the American people. And it's a hallmark of our democracy that we say what our laws are and what conduct they prohibit. We've seen what's happened when hidden decisions are made in secret memos and that's held from the American people, held from their representatives here in Congress. It erodes our liberties, but in undermines our values as a nation of laws.").

<sup>13</sup> Goldsmith, *supra* note 5, at 167.

<sup>14</sup> See Johnsen, *supra* note 3, at 1565; Hon. Alberto R. Gonzales, U.S. Attorney General, Prepared Statement (Feb. 6, 2006), [http://www.fas.org/irp/congress/2006\\_hr/020606gonzales.html](http://www.fas.org/irp/congress/2006_hr/020606gonzales.html) (last visited March 3, 2008).

<sup>15</sup> Carol D. Leonig & Eric Kich, *U.S. Seeks Silence on CIA Prisons*, WASH. POST, Nov. 4, 2006, at A1. See Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1056 (2008) ("the administration has offered no explanation of the purported dangers of revealing the program's very existence beyond the vague assertion that, while terrorists surely already know that the United States can survey their conversation, knowing about the program would remind them of this fact and might lead them to infer that surveillance is broader than they had assumed").

<sup>16</sup> *Wartime Executive Power and National Security Administration's Surveillance Authority: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 136 (2006), available at <http://fas.org/irp/congress/2006-hr/nsasurv.pdf>, at

The Bush administration Department of Justice used the fact that national security was its top priority to support extensive nondisclosure. For example, a March 2003 memorandum authored by Office of Legal Counsel attorney John Yoo provided legal comfort to interrogators of detainees captured during the war on terror.<sup>17</sup> This memorandum sought to insulate U.S. government officials from prosecution or other legal liability if they used coercive interrogation techniques such as waterboarding, head-slapping, and exposure of prisoners to extreme temperatures.<sup>18</sup> The existence of this memorandum was known outside of the Bush administration for several years, but the administration refused requests to disclose the memorandum—based on purported national security concerns associated with the release of the opinion.<sup>19</sup> The memorandum had been classified to prevent disclosure, but was declassified and disclosed in April 2008 in response to a Freedom of Information Act lawsuit.<sup>20</sup> It is unclear what legitimate basis existed for the memorandum to be withheld from public scrutiny, since it contained neither sensitive personal information nor details about specific intelligence-gathering programs.

The Bush administration's other proffered justification for nondisclosure turned on a unilateralist reading of the unitary executive theory, which held that the President alone has the authority to decide how the administration will fulfill its constitutional obligations.<sup>21</sup> The Bush administration relied on textual arguments such as the Commander-in-Chief clause and the Vesting Clause of the Constitution to claim unilateral jurisdiction over war-related decision making.<sup>22</sup> This approach discounted the fact that the framers of the Constitution and early administrations emphasized pragmatic power-sharing between Congress and the President, particularly with regard to the actions of the Attorney General, an office adopted from British and state colonial governments whose original goal was to provide counsel for both the President and Congress.<sup>23</sup> This approach also inappropriately set aside Congress's constitutionally granted war powers, including Congress's right to regulate captures during war and to conduct oversight of the President even in matters of national security.<sup>24</sup>

The claim that disclosure of legal policies is unnecessary and unwise because it would jeopardize U.S. national security interests is questionable, given both the experiences of the U.S. and other nations, as well as serious concerns about the maintenance of the rule of law. First, the Bush administration offered no credible evidence that disclosure will harm or has harmed U.S. national security interests; in fact, it offered no evidence that the disclosure of the OLC

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137. See *id.* at 19, 41, 76-77, 80, 83, 130-131, 138 for further pragmatic arguments in favor of non-disclosure of national security-related legal policy to Congress.

<sup>17</sup> Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., to William J. Haynes II, Gen. Counsel, Dep't of Def. 8 n. 10 (Mar. 14, 2003) [hereinafter Yoo Memorandum].

<sup>18</sup> *Id.*

<sup>19</sup> Dan Eggen & Josh White, *Memo: Laws Didn't Apply to Interrogators*, WASH. POST, Apr. 2, 2008, at A1.

<sup>20</sup> Press Release, Am. Civil Liberties Union, Secret Bush Administration Torture Memo Released Today in Response to ACLU Lawsuit (Apr. 1, 2008).

<sup>21</sup> See, e.g., Yoo memorandum, *supra* note 17; see also James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16 2005, at A1.

<sup>22</sup> See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of the War Powers*, 84 CAL. L. REV. 167 (1996).

<sup>23</sup> Baker, *supra* note 3, at 37-38.

<sup>24</sup> U.S. CONST. art I, § 5, cl. 2 (implied right to oversight); *id.* at § 8, cl. 11 (wartime captures).

memoranda that were initially withheld from public scrutiny negatively impacted U.S. national security programs. Repeated claims of a need for secrecy based on national security concerns ultimately undermined the Bush administration's claim, with more evidence pointing to secrecy being maintained primarily for political purposes.<sup>25</sup> Further, the Bush administration failed to make its case as to why legal policies governing the war on terror must be afforded more secrecy than domestic criminal laws and procedural rules. If the U.S. or any democratic nation chooses to rely on secret laws and thus deviate so substantially from the general edicts of the rule of law, the public deserves a credible and clear explanation as to why that deviation is necessary.

### III. Transparency of Legal Policy in Other Nations

The claim that national security threats require secret law and an unprecedented lack of transparency is undermined by comparison with other nations. Other countries that face serious national security issues have no mechanism or allowance for secret legal policies to govern national security matters; instead, several nations publicize, disseminate and publicly debate the same type of legal policy that was withheld from public scrutiny by the OLC during the Bush administration. A comparative perspective, even of nations with significant different governmental structures, provides some context to evaluate the U.S. administration's pragmatic justification for non-disclosure.<sup>26</sup>

#### A. India

India has been coping with serious national security concerns, both internal and external, for the last 60 years.<sup>27</sup> By some accounts, India is the nation that has faced the highest number of terrorist acts in recent years.<sup>28</sup> The similarities with the U.S. national security landscape are noteworthy. The central government of India has responsibility for developing laws and policies to preserve the national security of India,<sup>29</sup> and the country goes through periods of conflict in which its otherwise supposedly impartial and unbiased legal policy becomes politicized and prone to government overreaching in the areas of civil rights and civil liberties.<sup>30</sup> In the last nine years, both India and the U.S. have experienced a period of intense focus on national security in the wake of significant terrorist attacks. India passed a number of strong antiterrorism laws in recent years which grant additional authority and power to the central government to maintain national security. In the wake of the September 11, 2001 terrorist attacks and attacks on Indian government buildings soon afterward,<sup>31</sup> the Indian Parliament enacted the Prevention of

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<sup>25</sup> Editorial, *Politics, Pure and Cynical*, N.Y. TIMES, Mar. 14, 2007, at A22.

<sup>26</sup> Kim Lane Scheppele, *We Are All Post-9/11 Now*, 75 FORDHAM L. REV. 607, 609 (2006) (noting the value of considering other countries' experiences with balancing national security with other constitutional interests).

<sup>27</sup> See Anil Kalhan, et al., *Colonial Continuities: Human Rights, Terrorism and Security Laws in India*, 20 COLUM. J. ASIAN L., Fall 2006, at 1, 99.

<sup>28</sup> E.g., Arun Venugopal, *India Worst Hit by Terrorism in 2004*, INDIA ABROAD, Aug. 19, 2005, at A14.

<sup>29</sup> INDIA CONST., art. 246, List I, §§ 1-2, 2A; *id.* at List III, §§ 1-2.

<sup>30</sup> For example, the Defence of India Act of 1962 authorized the central and state governments to broaden their use of preventative detention beyond ordinary laws as a means to quell potential uprisings against the government and in response to hostilities in the Jammu and Kashmir region. See Kalhan, *supra* note 27, at 132-33 (citing VENKAT IYER, STATES OF EMERGENCY: THE INDIAN EXPERIENCE 109 (2000)).

<sup>31</sup> The Indian parliament building in New Delhi was attacked in December 2001, with 12 people killed and 22 injured in an exchange of gunfire. See 2001: *Suicide Attack on Indian Parliament*, BBC NEWS, available at

Terrorism Act, 2002 (POTA). Under POTA, the government, in conducting antiterrorist activities and in case of a self-determined emergency, was authorized to set aside ordinary legal protections with regard to wiretapping any person within India without authorization, extend the duration and scope of preventative detention measures, and deny arrested suspects access to counsel.<sup>32</sup> Some antiterrorist activities legally authorized under POTA parallel what was initially authorized under the USA Patriot Act, particularly in terms of allowing for enhanced surveillance of citizens and increasing authority for other intelligence-gathering efforts.<sup>33</sup>

The responsibility for the creation of legal policy in India is diffuse, with the parliament having the ultimate ability to set the law, while the prime minister and administrative departments play central, but not decisive, roles. In addition, certain critical issues can be referred to external committees and commissions. For example, an early iteration of some of the POTA policies was a 2000 report<sup>34</sup> drafted by the Indian Law Commission,<sup>35</sup> a nonpartisan commission of respected lawyers and jurists who respond to government requests for legal recommendations. This referral reflects the fact that the executive branch viewed the task of drafting legal policies for at least some national security issues to warrant thoughtful and apolitical analysis to structure and recommend long-term responses to threats of terrorism. The 2000 report contained recommendations that the parliament strengthen the central government's power to conduct antiterrorism operations, primarily in light of ongoing domestic unrest that could provoke a national crisis. Even at this early stage, transparency and public opportunity for comment were considered. The Law Commission, in accordance with its own policies, circulated the report to the public through its website and distributed the report to government officials for review and comments.<sup>36</sup>

POTA's enactment (and eventual repeal) illustrates the important role that transparency can play in permitting political accountability. After the September 11 terrorist attacks in the U.S., the Indian parliament began debate on whether to pass the Law Commission's recommendations from the 2000 report into law. In the meantime, because of the perceived immediacy of the need for the intelligence-gathering tools outlined in the Law Commission's report, the executive branch issued the Prevention of Terrorism Ordinance of 2001, a temporary ordinance which put into place the recommended tools. POTA was enacted in March, 2002,<sup>37</sup>

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[http://news.bbc.co.uk/onthisday/hi/dates/stories/december/13/newsid\\_3695000/3695057.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/december/13/newsid_3695000/3695057.stm) (last visited June 6, 2008).

<sup>32</sup> Prevention of Terrorism Act, 2002, No. 15, Acts of Parliament, 2002, at §§ 43, 45, 49, 52.

<sup>33</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub.L. 107-56, 115 Stat. 272, at tit. II, § 218, tit. IX, § 901.

<sup>34</sup> Indian Law Commission, 173<sup>rd</sup> report (April 2000).

<sup>35</sup> The Law Commission is a non-partisan group of lawyers and judges commissioned by the central government to offer advice and proposals for legal reform. See Indian Law Commission, How Does the Commission Function?, available at [http://www.lawcommissionofindia.nic.in/main.htm#HOW\\_DOES\\_THE\\_COMMISSION\\_FUNCTION?](http://www.lawcommissionofindia.nic.in/main.htm#HOW_DOES_THE_COMMISSION_FUNCTION?) (last visited May 5, 2008).

<sup>36</sup> *Id.* (noting that the proposed reform is "sent out for circulation in the public and concerned interest groups with a view to eliciting reactions and suggestions. Usually a carefully prepared questionnaire is also sent with the document. The Law Commission has been anxious to ensure that the widest section of people [is] consulted in formulating proposals for law reforms. In this process, partnerships are established with professional bodies and academic institutions. Seminars and workshops are organised in different parts of the country to elicit critical opinion on proposed strategies for reform").

<sup>37</sup> Prevention of Terrorism Act, 2002 (enacted March 28, 2002).



but was met with a great deal of opposition from human rights advocates and opposing political parties.<sup>38</sup> In response, the Home Minister of India claimed that opponents to the measure were assisting the terrorists,<sup>39</sup> rhetoric that mirrors the public discourse within the United States in response to the Patriot Act, as well as the legal policy developed by the U.S. executive branch at that time. POTA became a driving issue in the 2004 parliamentary election. The Congress Party, then a minority political party, ran on the promise to repeal POTA because of the law's enabling of abuses of human rights and civil liberties.<sup>40</sup> When the Congress Party won the 2004 parliamentary elections, POTA was repealed almost immediately.<sup>41</sup>

No secret law exists in terms of Indian antiterrorism policies; instead, they are generated with a significant level of publicity and public accountability.<sup>42</sup> This publicity led to public and parliamentary support for POTA in 2002; that same publicity and public accounting led to the repeal of the Act in 2004. Whatever the content of anti-terror policies, the process of Indian policy-making demonstrates the ability to define the scope of—and legal comfort offered by—national security policy without undue secrecy.<sup>43</sup>

## B. Israel

Israel has dealt with serious national security issues since its founding in 1948, with scores of people dying each year in various types of attacks, including suicide bombings, car bombs, and kidnappings.<sup>44</sup> Israel's antiterrorism efforts, including the techniques used by Israel's General Security Service in interrogating detainees suspected of terrorist activities, are authorized broadly by Article 2(1) of the Criminal Procedure Statute and the government's general and residual powers under Article 40 of the Basic Law (Government).

The legal treatment of specific interrogation techniques used by the General Security Services is fundamentally different from how OLC memoranda treat the same issue. The authority of the General Security Service to employ certain interrogation techniques was

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<sup>38</sup> C. Raj Kumar, *Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties*, 33 *DENV. J. INT'L L. & POL'Y* 195, 196 (2005).

<sup>39</sup> Kalhan, *supra* note 27, at 152.

<sup>40</sup> *Id.* at 152, 190.

<sup>41</sup> Prevention of Terrorism (Repeal) Act, 2004, No. 26, Acts of Parliament, 2004. In response to the November 2008 terrorist attack in Mumbai that killed over 150 people and the public outrage that followed, many provisions of POTA were reintroduced in proposed legislation. See Unlawful Activities (Prevention) Amendment Bill, 2008; National Investigation Agency Bill, 2008. See also Somini Sengupta, *Dossier Gives Details of Mumbai Attacks*, *N.Y. Times*, Jan. 7, 2009, at A5 (describing November 2008 attacks in Mumbai).

<sup>42</sup> See also Right to Information Act, 2005 (containing provisions similar to FOIA, including an exemption for a deliberative privilege, but not for adopted policies).

<sup>43</sup> Although a number of acts of terrorism have occurred in India in the last several years, no credible argument has been made that the publication of India's legal policies surrounding national security is one of the bases for attacks occurring.

<sup>44</sup> H.C. 5100/94, *Public Comm. Against Torture in Isr. v. Government of Israel*, 53(4) P.D. 817, at ¶ 1 (1999) ("The State of Israel has been engaged in an unceasing struggle for both its very existence and security, from the day of its founding"); Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 *MICH. L. REV.* 1906, 1919 (2004).

examined by the Israeli Commission of Inquiry,<sup>45</sup> which concluded in 1995 that the General Security Service had the authority to interrogate suspects using certain physical techniques, and established the availability of a *post factum* defense of “necessity” for interrogators who engaged in what would otherwise be considered criminal actions.<sup>46</sup>

The General Security Service interpreted the necessity defense broadly; like various OLC memoranda, the necessity defense was interpreted internally such that interrogators were given broad legal comfort that they could not be prosecuted for torturing terrorism suspects so long as they were doing so in an effort to preserve national security.<sup>47</sup> But unlike the similar Office of Legal Counsel memoranda, this interpretation of the necessity defense was not kept secret from the public, courts, or detainees themselves.<sup>48</sup>

In *Public Committee Against Torture in Israel v. Government of Israel*, human rights groups and individual detainees challenged the blanket reading of the necessity defense based on rule of law and human rights concerns. The court, with some reservations given Israel’s national security issues, unanimously held that broad legal comfort to protect interrogators who torture suspects was unacceptable under Israeli Basic Law.<sup>49</sup> The court struggled with several national priorities:

“[w]e are aware that this decision does not ease dealing with that harsh reality [of Israel’s security issues]. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual’s liberty constitutes an important component in its understanding of security.”<sup>50</sup>

The High Court, however, affirmed the availability of a necessity defense for individual interrogators being prosecuted for using such techniques during a perceived national security emergency, but rejected the argument put forth by the Israeli government, which parallels the arguments set forth in various Office of Legal Counsel memoranda, that blanket immunity ought to apply to the interrogators’ actions.<sup>51</sup>

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<sup>45</sup> The Commission of Inquiry, which undertakes investigations of government actions, was convened under the authority of the Commission of Inquiry Statute in 1968.

<sup>46</sup> The techniques at issue included harsh shaking which, in one instance, led to the death of the detainee; prolonged detention in stress positions; exposure to extreme temperatures; and covering the detainee’s head with a vomit-covered hood. H.C. 5100/94 at ¶¶ 2, 8-13, 15, 19.

<sup>47</sup> *Id.* at ¶¶ 8, 15-17.

<sup>48</sup> *Id.* at ¶¶ 8 (“The decision to utilize physical means [in interrogation]...is based on internal regulations, which requires obtaining permission from various ranks of the [Security Services] hierarchy. The regulations themselves were approved by a special Ministerial Committee...[t]he Committee set forth directives pertaining to the rank authorized to allow these interrogation practices); ¶17 (“The [Security Services’] authority to employ particular interrogation methods, and the relevant law respecting these matters were examined by the Commission of Inquiry (whose report was published, as mentioned, in the Landau Book)”).

<sup>49</sup> *Id.* at ¶¶ 38-40.

<sup>50</sup> *Id.* at ¶ 39.

<sup>51</sup> *Id.* at ¶ 38.

The *Public Committee Against Torture* decision illustrates how Israel navigated the tension between adhering to the rule of law and maximizing national security efforts, particularly with respect to making public the legal policies and parameters under which the General Security Service interrogators were acting.

### C. United Kingdom

The United Kingdom (UK) has dealt with significant internal and external threats to national security for many decades. A central influence on the development of the UK's modern national security regime was the violent conflicts, known as "The Troubles," in Northern Ireland, which escalated in the late 1960s and were largely resolved only in 1998, with the signing of the Belfast Agreement.<sup>52</sup> During The Troubles, almost 3,000 people were killed and over 30,000 were seriously injured.<sup>53</sup> More recently, the UK has been confronted with international terrorist threats, including an attack on the London mass transit system in July 2005 which killed 56 people, including the attackers, and injured over 700 others.<sup>54</sup>

UK law has vacillated in terms of trying to maintain a balance among the interests of national security, civil rights and liberties, and the rule of law. Complicating matters is that the UK is under the jurisdiction of the European Court of Human Rights (ECHR), and that detainees have the right to appeal domestic legislation and judicial decisions to the ECHR.<sup>55</sup>

As in India, Israel, and the United States, the British Prime Minister is endowed with war-making power as a legacy of a historical Crown prerogative; nevertheless, he or she almost always seeks authorization of the Parliament to act.<sup>56</sup> Additionally, UK law and constitutional norms require that emergency powers be exercised in a legal framework involving the Parliament and the courts,<sup>57</sup> a striking contrast to the Bush administration's vision of wartime decision-making as solely within the purview of the President.

The mandatory involvement of the legislature and nature of British parliamentary supremacy has ensured that executive branch legal policy does not unilaterally determine how national security interests are going to be balanced with constitutional constraints. The role of the legislative body also ensures that debate and passage (as widely publicized and generally televised) face public scrutiny and the political accountability that such scrutiny allows. The role of Parliament has forced the Prime Minister to pass legislation in order to deal with particular situations in the war on terror; for example, in November 2005 former Prime Minister Tony Blair

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<sup>52</sup> Belfast Agreement, Ir.-U.K., Apr. 10, 1998, available at <http://cain.ulst.ac.uk/events/peace/docs/agreement.htm#support> (last visited June 10, 2008).

<sup>53</sup> Schulhofer, *supra* note 44, at 1933.

<sup>54</sup> House of Commons, Report of the Official Account of the Bombings in London on 7th July 2005, 2006H.C. 1087, at 2.

<sup>55</sup> Schulhofer, *supra* note 44, at 1943.

<sup>56</sup> Matthew Tempest, *Government Kills Short's War Bill*, GUARDIAN, Oct. 21, 2005 (London), <http://politics.guardian.co.uk/iraq/story/0,12956,1597883,00.html>.

<sup>57</sup> Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2499 (2006) (addressing the cooperation among the Prime Minister, Parliament and the judicial system in dealing with the ramifications of an emergency situation); CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 185-89 (1948).

was unable to pass legislation that would allow the government to detain terrorism suspects for up to 90 days without being charged because the House of Commons, led by Blair's own Labour Party, voted down the proposed legislation.<sup>58</sup>

Further, since the United Kingdom's acceptance of the jurisdiction of the European Court of Human Rights (ECHR), the judicial check on executive exercise of national security powers is a robust one: domestic judicial review is available for all national security-related legal policy, even in times of war, including challenges to the treatment of individual detainees. The 2004 decision of *A v. Secretary of State for the Home Department*<sup>59</sup> illustrated that British courts will act decisively to counteract national security laws—in that case, the Anti-Terrorism, Crime and Security Act, 2001 Part IV—if they deem it to be disproportionate and discriminatory under ECHR standards.<sup>60</sup>

Finally, U.K. accountability on national security law and policy is bolstered by a series of independent reviews authorized by the House of Commons in which a member of the House of Lords was granted the necessary security clearance and a mandate to make independent reports on the operation of the Terrorism Act, 2000 and the Prevention of Terrorism Act, 2005.<sup>61</sup> Those reports were published to Parliament and the public in 2008<sup>62</sup> and 2007,<sup>63</sup> respectively.

#### IV. Is There Still a Need for Reform?

Given that the Obama administration appears committed to greater transparency and assuming internal constraints can be re-established to maintain impartiality and best practices, is it still necessary to advocate for Office of Legal Counsel reform?<sup>64</sup> In order to establish long-term process protections for the rule of law, I assert that external structural constraints, particularly transparency requirements, continue to be necessary. This is particularly true when both houses of Congress and the President belong to the same political party—if Congress does not have the political will to exercise oversight of the OLC during any given administration,

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<sup>58</sup> Martinez, *supra* note 57, at 2499; Ed Johnson, *Great Britain: Parliament Rejects Crucial Blair Antiterrorism Bill*, MIAMI HERALD, Nov. 10, 2005, at A15.

<sup>59</sup> [2004] UKHL 56, [2005] 2 A.C. 68 (U.K.).

<sup>60</sup> See Alexandra Chirinos, *Finding the Balance Between Liberty and Security: The Lords' Decision on Britain's Anti-Terrorism Act*, 18 HARV. HUM. RTS. J. 265 (2004). Notably, the legislation in question had been reviewed and criticized by Parliament's Joint Committee on Human Rights and the Privy Counselor Review Committee prior to being heard in court. *Id.* at 267.

<sup>61</sup> Kent Roach, *Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain*, 27 CARDOZO L. REV. 2151, 2171 (2006) (noting the need for such a measure to ensure against "[w]idespread public suspicion about national security activities [which] could eventually compromise the effectiveness of security activities").

<sup>62</sup> LORD CARLILE, REPORT ON THE OPERATION IN 2007 OF THE TERRORISM ACT 2000 AND OF PART I OF THE TERRORISM ACT 2006, 2008, available at <http://security.homeoffice.gov.uk/news-publications/publication-search/terrorism-act-2000/TA2000-review061.pdf?view=Binary>.

<sup>63</sup> Lord Carlile, Second Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, 2007, available at <http://security.homeoffice.gov.uk/news-publications/publication-search/prevention-terror-act-2005/Lord-Carlile-pta-report-2006.pdf?view=Binary>.

<sup>64</sup> Johnsen, *supra* note 3, at 1579 (noting that "the power of unwritten tradition alone plainly is inadequate" to maintain OLC best practices).

mandated disclosure can and will serve as a backstop.<sup>65</sup> Further, politicization and political pressure may be inevitable in times of war. Politicization that leads to self-interested actions, such as keeping secret potentially controversial legal policies, highlights the need for institutionalized checks and balances such as mandated disclosure.

Instituting an internal model of best practices at OLC might not suffice, since asking OLC lawyers to adhere to a particular model of best practices may be futile if those lawyers already believe that they are adhering to best practices with regard to their legal analysis.<sup>66</sup> Various Justice Department officials from the Bush administration made clear that they believe that the legal opinions drafted by the OLC were done so in good faith and through the best possible interpretation of the law.<sup>67</sup> Jack Goldsmith, former head of the OLC and a strong critic of some tactics of the Bush administration, stated that everyone he dealt with in the Bush administration “thought they were doing the right thing” in developing OLC legal opinions.<sup>68</sup> The belief that a different set of principles will once again prevail in the OLC and the administration, without further measures to ensure greater information disclosure, inherently assumes that the breakdown of previous OLC norms is peculiar to one administration and will not recur in the future.<sup>69</sup>

The question that remains after all of the hand-wringing over the Bush administration politicization of the OLC is whether President Obama and every future president will be successful in re-establishing OLC objectivity and best practices, in which case the information disclosure problems highlighted here may not need to be addressed further. However, future presidents may find it helpful and self-serving to use the Bush administration as precedent to

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<sup>65</sup> See George C. Edwards III & Andrew Barrett, *Presidential Agenda Setting in Congress*, in POLARIZED POLITICS 109, 112-16 (Jon R. Bond & Richard Fleischer eds., 2000); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2679 (2005) (noting that under unified government, Congress tends to support the President without questioning the wisdom of his policies); Sudha Setty, *The President's Question Time: Power, Information and the Executive Credibility Gap*, 17 CORNELL J. L. & PUB. POL'Y 247, 262 (2008) (noting that the Congressional investigative function is limited in times of one-party government).

<sup>66</sup> John Yoo, who drafted at least part of the Bybee Memorandum, maintains that his advice was not politically motivated, and that it represented an impartial, accurate reading of the law:

“It is very important not to put in an opinion interpreting a law on what you think the right thing to do is, because I think you don’t want to bias the legal advice with these other considerations. Otherwise, I think people will question the validity of the legal advice. They’ll say, ‘Well, the reason they reached that result is that they had certain moral views or certain policy goals they wanted to achieve.’ And actually I think at the Justice Department and [the OLC], there’s a long tradition of keeping the law and policy separate.”

*Frontline: PBS Interview with John Yoo, The Torture Question* (PBS television broadcast July 19, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html>.

<sup>67</sup> *Hearing Before Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 11 (2008) (statement of John Yoo, former Deputy Assistant Att’y Gen.) (“we in OLC were determined . . . to interpret the law, in good faith . . . by operating within the bounds drawn by the laws and the Constitution of the United States. Now as then, I believe we achieved this goal.”); Oversight Hearing, *supra* note 11 (remarks of then-Att’y Gen. Mukasey).

<sup>68</sup> Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES MAGAZINE, Sept. 9, 2007.

<sup>69</sup> In fact, then-Attorney General Mukasey has pointed out that no one at the Office of Legal Counsel ever thought that they were promulgating a bad opinion or that they were breaking the law. Oversight Hearing Transcript, *supra* note 11, at 68.

cement the aggregation of executive power<sup>70</sup> and limit access to Office of Legal Counsel legal policy whenever it becomes expedient to do so, in which case we must consider whether additional structural or institutional measures will be helpful to improve the quality of Office of Legal Counsel opinions while maintaining the integrity of sensitive national security programs to which some legal opinions relate. As one Bush administration critic put it, “What was once shocking and unacceptable in America has now been internalized as the new normal.”<sup>71</sup>

## V. Conclusion

This Issue Brief does not prescribe a single solution to the problem of ensuring objectivity, transparency, and political accountability in OLC opinions. However, I argue that, at the very least, we should discard the notion that transparency in the law is impossible for a nation facing serious national security concerns. A look at just a small sampling of nations—India, Israel, and the U.K.—that face threats of terrorism shows that secret law is not necessary.

Of course, questions might be raised about the overall effectiveness of the national security policies in India, Israel, and the United Kingdom compared to the United States, and there is always the possibility that, despite our understanding that nations are adhering to the rule of law (through court decisions, governmental statements, and legislative oversight), a nation is actually secretly developing contrary national security policies. However, if such secret policy exists in these other countries, there is no indication that those policies would provide legal comfort against future prosecution. Further, although the models of developing national security legal policy in other nations do not have direct applicability to US policy, in grappling with how to balance transparency and national security concerns, the US can and should look beyond its borders to examine how other nations have fashioned solutions.

The politicization of the OLC during the Bush administration, when combined with the predictable self-interest of any administration in not voluntarily disclosing its own legal policies, suggests that structural change should be considered to ensure greater long-term transparency and adherence to the rule of law. Broad structural change would permit the objectivity, integrity, and transparency of OLC opinions to be vouchsafed from administration to administration. Such change is necessary to restore the rule of law and the standing of the U.S. as a nation that is a standard bearer for democratic principles.<sup>72</sup> Eliminating the existence of secret laws which provide legal comfort and restoring the democratic principles of the application of law are two important means of doing so, and the experiences of other countries should suggest to us that making such changes are possible.

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<sup>70</sup> See Bruce Ackerman, *Terrorism and the Constitutional Order*, 75 FORDHAM L. REV. 475, 477-78 (2006) (noting that “whatever new powers are conceded to the President in this metaphorical war [on terror] will be his forever”).

<sup>71</sup> Frank Rich, *The Coup at Home*, N.Y. TIMES, Nov. 11, 2007. See Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699 (2006).

<sup>72</sup> See generally Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003) (addressing the unique role of the U.S. in promoting democratic ideals).